The appeal has no merits at all. The learned magistrate's decision was correct. He had seen the witnesses giving evidence, and had found that the evidence given by the witnesses for the prosecution could not be reliable. He had found that the respondent had given evidence in a straightforward manner and had found as a fact to be believable and that the respondent's defence had raised a reasonable doubt in the prosecution's case, with which I concur.

The appeal is dismissed and the decision of the learned magistrate is affirmed.

Appeal dismissed.

Solicitors: *Gunaretnam & Co.*

Reported by *Gabriel Sebastian*

Ellamah d/o Ellapen v Renganathan s/o Komarasamy & Ors

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO F487 OF 1985
SITI NORMA YAAKOB J
11 DECEMBER 1987

Land Law – Transfer of land – Plea of fraud – Plea of non est factum

Prior to 2 May 1984, the plaintiff was the registered proprietress of a certain piece of land but after that date, the defendants became the registered owners. It was this transfer which the plaintiff now disputed. The plaintiff alleged that she did not consent to it and that it was null and void. She also sought to impeach the transfer on the ground that it was a fraudulent transfer.

Held: (1) There was overwhelming evidence that there was fraud in the transfer of the land.

(2) The transfer was declared null and void.

Case referred to
1 *Saminathan* v *Pappa* [1981] 1 MLJ 121 (refd)

Legislation referred to
National Land Code 1965 ss 325-328, 340

Mathew Thomas (*Vadiveloo s/o Anumathau* with him) for the plaintiff.
Davidason Gopal for the defendants.

Cur Adv Vult

Siti Norma Yaakob J: The parties to this suit belong to one family and their dispute is over the ownership of a piece of land measuring five acres in area, where they all live in four houses that have been erected on it.

Prior to 2 May 1984, the plaintiff was the registered proprietress of the land but after that date, her three sons, the defendants, became its registered owners. It is this transfer that the plaintiff now alleges as being null and void as she had never consented to it in the first place and that her thumb-print appearing on the transfer form was obtained fraudulently. To that end, she also relies on the plea of non est factum and in this she claims the re-transfer of the land into her name.

The plaintiff has nine children, six daughters and three sons who are the defendants. From AB2, a letter dated 20 June 1975 written by her six daughters, it is very clear that the dispute over the land had been long outstanding between the female and male members of the family. The letter addressed to the Datok Penghulu, Jeram, and copied to the Ketua Kampong Sungai Buloh and the Member of Parliament of the area, sought the assistance of the Datok Penghulu to settle the dispute but nothing appears to have come out of it.

It is not disputed that in March 1984, a meeting was held at the home of the first defendant attended by all the members of the family and their respective spouses but different versions were given as to the purpose of the meeting.

The plaintiff testified that she had summoned the meeting so as to resolve the question of distributing the property between her children and in this respect her evidence is supported by her grandson, PW4, who testified that on the instructions of his grandmother, he had summoned all his uncles and aunts to the meeting. The defendants, however, maintain that the meeting never discussed the distribution of the property and that the only matter discussed was the settlement of a quarrel over the assault of PW4 by his uncle, the first defendant. If that was so, no reason was given by the first defendant as to the cause of the assault and the third defendant even testified that he was not even aware that such a meeting had taken place.

The only independent witness to this meeting, PW3, who had been specially summoned from Shah Alam, however, testified that 20 people attended the meeting and before it commenced he had ascertained the purpose of the meeting from the plaintiff which was to discuss the division of the property between her sons and daughters.

Bearing in mind the number of people attending the meeting and the ill feelings between the children of the plaintiff, I have no doubt that the plaintiff had called the meeting specially to discuss the distribution of the property. It seems highly inconceivable that such a large number of people should meet specially to settle a quarrel over an assault for which no reason or circumstances were given as to why or how it had taken place. The meeting must have been to discuss something more urgent or pressing and this could only be the distribution of the land over which so much ill feelings had surfaced

since 1975. Moreover, there is PW1's undisputed evidence that the assault on her son, PW4, only happened after the meeting and not before.

At this meeting, the plaintiff proposed dividing the land into four shares, one each to the three defendants, and PW1, her eldest daughter, who is the widow of her brother and who had contributed to the purchase of the property. The defendants objected to PW1 getting a share and annoyed by their brothers' objection, the other five daughters of the plaintiff also demanded a share of the property. To break the impasse, the plaintiff decided that she would divide the property into ten shares, one each to her nine children and the tenth share to her grandson, PW4. This roused the anger of the defendants and the meeting nearly ended in blows when the third defendant attempted to hit the plaintiff with a chair. He was, however, prevented from doing so and the meeting ended with no agreement reached as to how the property was to be divided.

There is also evidence that soon after this meeting, and on 21 March 1984, the plaintiff executed a will, P1, before a solicitor, Mr Munusamy Gopal Krishnan, PW5, in which she named PW1 as her executrix and trustee and bequeathed the property equally amongst her nine children and grandson.

To protect her interest in the land, PW5 also prepared a caveat, AB5, for PW1 the same day, but the statutory declaration accompanying the caveat is, however, dated 13 March 1984 and executed by PW1 before a Commissioner of Oaths. Be that as it may, the caveat was registered on 22 March 1984 as is evidenced by the registrar's entry in AB7.

From the typewritten date appearing in the transfer form at AB15 and 16, it would seem that Form 14A was also executed on 21 March 1984, the very day the plaintiff executed her will and PW1 executed her caveat. However, the date in Form 14A has been amended to 22 March 1984, and DW4, the Assistant District Officer, Kuala Selangor, before whom the transfer was executed, admitted he had made a change to the date but had not initialled it. DW3, the petition writer who filled up the transfer form, also admitted that he did so on 22 March 1984 as was rightly written on AB14 but at AB15 and 16, the date has been typewritten as 21 March 1984.

Taking 22 March 1984 as the date when the transfer was executed, it is glaringly clear that it was done on the day PW1's caveat was registered and a day after the plaintiff had willed the same place of land to her nine children and grandson in equal shares. When viewed by itself, it does not stand to reason that on one hand the plaintiff had devised the land to all her children and grandson equally and 24 hours later agreed to transfer the same piece of land to the three defendants to the exclusion of her daughters and grandson.

Although the transfer was executed on 22 March 1984, it must still be remembered that PW1's caveat was already registered that same day and for the transfer to be registered, PW1's caveat must first be removed. How was this done?

There was no oral testimony from any of the defendants on how they managed to perform such a feat without PW1's knowledge as under the National Land Code then in force, it can only be removed in one of the following ways:

(1) By a notice in writing given to the Registrar by the person at whose instance it was entered, under s 325(1).
(2) By any person upon application to the Registrar, under s 326(1).
(3) By the court upon application made to it by any person aggrieved by the existence of such a caveat, under s 327(1).
(4) By lapse of time after the expiry of six years from the time it took effect, under s 328(1).

The defendants rely on s 325(1) and for this they depend on AB7, a letter dated 16 April 1984, thumb-printed by PW1 as proof that she had voluntarily withdrawn the caveat and this was acted upon by the Collector on 2 May 1984 and the transfer effected the same day in favour of the three defendants. As I have stated earlier, there was no evidence from the defendants how AB7 came to be executed. PW1 denied any knowledge of it but she remembered going to the land office once with the plaintiff accompanied by two unidentified Malay men who had fetched them from their house. At the land office, both she and the plaintiff were made to sign typewritten and handwritten forms and she was assured by the interpreter, DW5, who was specially called to assist them, that the form she was thumb-printing relates to her mother's application for a subsidy for manure. In this respect, it is not disputed that RISDA had been supplying subsidies for manure for the land but the plaintiff had received such subsidies through the post.

At the land office, PW1 was pretty certain that she signed on only one document and since she was not one of the transferees in the transfer, the one document that she thumb-printed must be AB7. Her testimony that she would not have thumb-printed it if the true facts were made known to her also stands to reason as it is most unlikely that she could have agreed to remove the caveat when the sole purpose of her lodging it in the first place was to protect her interest and to prevent any dealings on the land.

Likewise the plaintiff, being old and illiterate, was not able to identify the forms that she had thumb-printed at the land office and that she relied greatly on DW5 and when she executed the transfer, it was on the assurance given by DW5 that the forms relate to her applica-

tion for a subsidy. She testified that she only made one trip to the land office and she was not accompanied by the third defendant but by two unknown male Malays. At the land office, she only met DW5, apart from the two male Malays, and she also testified that she would not have signed such forms had she known that she was transferring her only property to the defendants. She denied meeting the defendants and the petition writer, DW3, and this may well explain why DW3 wrongly identified PW1 in court as being the plaintiff.

There can be no doubt whatsoever that the document the plaintiff signed was Form 14A, AB14, as being the recipient of a subsidy for manure; it does not stand to reason that she should make a further application for such a subsidy. To that extent, DW5 had blatantly misrepresented the true facts to both the plaintiff and PW1 and his evidence that he only interpreted whatever was told to him by the Assistant District Officer, DW4, before whom the transfer was executed, cannot be believed.

Perhaps the most telling evidence that had surfaced in this case is the attempt made by the first defendant to transfer his share of the property to his wife after this suit was filed, so as to defeat the plaintiff's claim. He had also tried to get his two brothers, the second and third defendants to do likewise. The first defendant's excuse for doing so was that he was getting old and being a drunkard, he feared that he might transfer the land to some third party, without him being fully aware of the consequences of his action. However, when cross-examined why he did not attempt to transfer another piece of land that he owned to his wife, he was not able to give any satisfactory answer. Bearing in mind that at the time of such attempted transfer this suit has already been filed and served on him, there is no doubt whatsoever that his motive for doing so was nothing more than to defeat the plaintiff's claim.

Since the plaintiff seeks to impeach the defendants' title to the property on the ground that the transfer was obtained fraudulently under s 340(2)(a) of the National Land Code, the burden of proving fraud is the criminal law burden of proof beyond a reasonable doubt (*Saminathan* v *Pappa*[1]) and that all particulars of fraud must be set out in detail.

The only particulars appearing in the statement of claim are those found in para 6 where there is an allegation that the defendants employed the services of third parties to force the plaintiff to transfer the property to them. Although the pleadings are wanting in that they do not set out other particulars of fraud, the evidence, however, clearly shows that other instances of fraud have occurred but since no objection was raised by Mr Davidason, counsel for the defendants, in the course of the trial of the lack of particulars in the pleadings, I can only assume that his clients have not been in any way prejudiced by the lack of particulars. Be that as it may, since there is overwhelming evidence that the transfer was not executed with the plaintiff's consent as she was not made aware that she was transferring her property to the defendants, an intention that runs contrary to that expressed by her in P1, and bearing in mind the whole circumstances of this case, it is my considered opinion that the insufficient particulars should not be a bar to the plaintiff's claim. As there is overwhelming evidence to establish fraud, it is only just and fair that the omission on the part of solicitors should not be a bar to her succeeding in this suit.

Likewise, since the plaintiff also seeks to disown the instrument of transfer, AB14-16, the burden of establishing so lies with her. Although this plea of non est factum has not been specifically pleaded by her, nonetheless no objection was taken by the defendants and since fraud has been established from the evidence, there is nothing to suggest that she had been in any way negligent when affixing her thumb-print to the transfer.

Since the plaintiff's concern is that the instrument of transfer dated 22 March 1984 be declared null and void, I accordingly make such an order and further direct that the Land Administrator, Kuala Selangor restore the plaintiff as the registered proprietress of the land. The defendants shall also bear the costs of this suit.

Order accordingly.

Solicitors: *Matthew Thomas & Co*; *Syarikat Davidason.*

Reported by *Gabriel Sebastian*

Public Prosecutor v Low Kok Wai

HIGH COURT (PENANG) – CRIMINAL TRIAL NO 58-10-86
MOHAMED DZAIDDIN J
25 JANUARY 1988

Criminal Procedure – Sentencing – Drug trafficking offence committed before April 1983 – Discretion of court to sentence accused to death or imprisonment for life – Principles applicable

The accused pleaded guilty to a charge of drug trafficking under the Dangerous Drugs Act 1952. As the offence was committed on 12 August 1982, ie before April 1983, the law gave the court a discretion to sentence the accused to death or imprisonment for life and whipping. On sentencing the accused to death by hanging, the court elaborated on the applicable sentencing principles.

Held: (1) Other than in the most exceptional circumstances, a sentence of death should be imposed to show the gravity of the offence and public disapproval, to punish the offender and most of all to protect the public.